90-213

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1990

LOUIS A. LaRAIA,

Petitioner,

vs.

COMMONWEALTH OF PENNSYLVANIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI DIRECTED TO THE SUPERIOR COURT OF PENNSYLVANIA

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QUESTIONS PRESENTED FOR REVIEW

I. WHEN A CRIMINAL PROSECUTOR REMOVES ALL BLACKS FROM THE TRIAL JURY, DOES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT REQUIRE A PROTESTING WHITE DEFENDANT'S CONVICTION BE VACATED WITHIN THE MEANING OF *HOLLAND V. ILLINOIS*, JANUARY 22, 1990, ___ US ___, 110 S. CT. 803?

II. WHEN THE NON-TRIAL PRESIDENT JUDGE OF THE COURT WHERE A CRIMINAL DEFENDANT IS BEING PROSECUTED SECRETLY COMMUNICATES WITH THAT STATE'S HIGHEST JUDICIAL COURT WHEN PART OF THE CASE IS SUB JUDICE AND ALSO REFUSES TO GIVE THE DEFENDANT INVOLVED A COPY OF WHAT HE WROTE AND/OR A STATEMENT OF WHAT HE SAID, HAS THE CRIMINAL DEFENDANT BEEN DEPRIVED OF A FAIR TRIBUNAL AND/OR THE APPEARANCE OF JUSTICE PLUS HIS FUNDAMENTAL AND/OR HUMANE GUARANTEED RIGHTS?

III. DO THE FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES PROHIBIT PUNISHMENT OF A CRIMINAL DEFENDANT BECAUSE HE LEGALLY AND PROPERLY RESISTED A STATE SHAKEDOWN WHICH SPECIFICALLY USED ITS CRIMINAL COURTS IN AN ATTEMPT TO FORCE HIM TO PAY 50 TIMES THE ALLEGED VICTIM'S LOSS TO AVOID PROSECUTION?

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REFERENCE TO THE OFFICIAL AND UNOFFICIAL REPORTS

The en banc opinion of the Court of Common Pleas of Beaver County, Pennsylvania was filed July 6, 1987 and is not reported.

Notice of the Memorandum Opinion of the Superior Court appears at ___ Pa. Super. ___, 559 A.2d 963 (December 22, 1988).

This Opinion has not been published, is not precedental and applies to Petitioner's case, alone; *Com. v. Marconi*, 1989, ___ Pa. ___, 567 A.2d 628, 630; *Reed v. Reed*, 1985, ___ Pa. Super. ___, 493 A.2d 710, 712, N.2.

STATEMENT OF JURISDICTION

The order of the Superior Court on which Petitioner seeks review was entered December 22, 1988. Reargument was denied on February 23, 1989; see ___Pa. Super. ___, 559 A.2d 963.

The Supreme Court of Pennsylvania denied discretionary review on March 19, 1990, without opinion, and denied reconsideration on May 4, 1990 without opinion.

Jurisdiction for a certiorari petition to the Supreme Court of the United States is allowed by 28 USC 1257 (3).

CONSTITUTIONAL PROVISIONS INVOLVED

Fifth Amendment to United States Constitution.

"No person shall be – deprived of life, liberty, or property, without due process of law; – "

Eighth Amendment to United States Constitution.

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

Fourteenth amendment to United States Constitution. Section 1. "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Article 1, Section 1 of the Pennsylvania Constitution: Inherent Rights of Mankind.

Section 1. "All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness."

Article 1, Section 11 of the Pennsylvania Constitution: Courts to be open; suits against the Commonwealth.

Section 11. "All courts shall be open; and every man for an injury done him in his lands, goods, person or reputation shall have remedy by due course of law, and right and justice administered without sale, denial or delay. Suits may be brought against the Commonwealth in such manner, in such courts and in such cases as the Legislature may by law direct."

Article 1, Section 20 of the Pennsylvania Constitution: Right of Petition.

Section 20. "The citizens have a right in a peaceable manner to assemble together for the common good, and to apply to those invested with the powers of government for redress of grievances or other proper purposes, by petition, address or remonstrance."

Article 1, Section 26 of the Pennsylvania Constitution: Subdivisions: No Discrimination by Commonwealth or its Political Subdivisions.

Section 26. "Neither the Commonwealth nor any political subdivision thereof shall deny to any person the enjoyment of any civil right, nor discriminate against any person in the exercise of any civil right."

CONCISE STATEMENT OF FACTS MATERIAL TO THE CONSIDERATION OF THE QUESTIONS PRESENTED

Petitioner lived in a deserted area of a rural county in the Commonwealth of Pennsylvania. The 14.7 acres surrounding his home were posted "No Trespassing".

At about 10:80 PM on November 29, 1985, he heard noises disclosing his prize steer, at some distance from his home but on his land was being disturbed by a free running coon dog. He fired what he wanted to be a warning shot but accidentally hit the dog. The dog then began a run to Petitioner's location to attack him. Petitioner then shot at the dog to protect himself, prevent it from possibly hurting others and put it out of its misery.

A four-man hunting party plus a municipal part-time policeman shortly thereafter appeared to question Petitioner and search for the dog which was found dead.

The policeman had the choice of doing nothing, pursuing Petitioner by summary conviction or misdemeanor prosecution and chose the latter.

At the trial, the alleged victim, with the direct cooperation of the District Attorney and the approval of the Trial Judge, said the prosecution would be withdrawn if Petitioner would pay him $10,000 for the dog that cross-examination disclosed was allegedly purchased two months previously under very vague circumstances for $200. There were no papers for this pedigreed dog imported from out of state even though the law of Pennsylvania required such papers.

Petitioner refused to pay off and was convicted, denied a new trial or directed verdict of acquittal and lost his permitted appeal to the Superior Court of Pennsylvania. The Supreme Court of Pennsylvania denied discretionary review.

Before appeal, Petitioner was sentenced to two years probation, $200 restitution plus court costs and the maximum allowed $5,000 fine for the specific reason that he had put up a vigorous defense.

During Jury selection, Petitioner objected to the Assistant District Attorney using his peremptory challenges to remove all Blacks from the Trial Jury (278-a to 285-a). His objection was overruled (285-a) by the Trial Judge. Petitioner continued his objection in his post-trial motions (527-a, Paragraph AD; 535-a, Paragraphs 12, 13) and in the Superior and Supreme Courts. In his denial of a new trial opinion, approved en banc, the Trial Judge said that single Petitioner was White, the objection "is absurd" (619-a to 621-a). The Superior Court opinion (Page 20) said "These claims are without merit". The issue was raised in the Petition for Supreme Court discretionary review, Pages 20-27, and his motion for reconsideration and to amend both of which cited *Holland v. Illinois*.

The issue was raised in Petitioner's Superior Court Brief, his Petition for Supreme Court Review and his April 23, 1990 Supreme Court "Motion for Reconsideration –" and his February 28, 1990 "Motion for Leave to Amend Petition for Allowance of Appeal –".

After his conviction, but before the sentence, Petitioner discovered the President Judge of the Prosecuting County had held a secret meeting with the Chief Deputy Sheriff whom he had ordered to arrest and jail Petitioner. This oral order was never reduced to writing and was a direct overruling of a previous May 2, 1986 order of a

Pennsylvania Supreme Court Justice who had released Petitioner until further order of the Supreme Court.

When Petitioner's Counsel objected to the secret meeting during his June 6, 1987 New Trial and arrest of judgment argument before the five sitting Judges of the County sitting en banc, the same President Judge, who was not the Trial Judge, rejected the objection and emotionally advised he had written a letter about Petitioner to the Supreme Court of Pennsylvania.

Petitioner's Counsel objected. Although the President Judge promised to send Counsel a copy of this secret letter, he later refused to do so and efforts to obtain a copy of the letter and/or other secret communication with any court were resisted by the President Judge whose free lawyer was an employee of the Administrative Office of the Supreme Court of Pennsylvania.

Petitioner's attempts to obtain a copy of this letter or/and other possible evidence of ex parte appeal or other court contact were unsuccessful at all levels.

The Chief Deputy issue was formally raised in the prosecution county on June 1, 1987 in a "Motion to Reopen Case Because of Recently Discovered Evidence" and a June 4, 1987 "Motion Adding Facts to Record and Giving Additional Reasons for New Trial and Change of Venue".

The failure to produce the said letter was unsuccessfully raised on July 6, 1987 in the trial court by Petitioner's "Objection to July 6, 1987 Opinion and Disposition Order" and his August 5, 1987 "Motion to Dismiss

Case" and change venue and in a subsequent denied motion for a stay filed in the trial court.

It was also raised in an October 7, 1987 rejected trial court motion to reconsider the sentence, in the Brief filed in the Superior Court of Pennsylvania (Pages 65-68) and in the petition for discretionary review in the Supreme Court of Pennsylvania (Pages 82-86, 113) which also makes reference to where issue was raised in the trial court and the Superior Court where Petitioner pointed out that the President Judge and the District Attorney had the same Election Campaign Manager whom they specifically identified and that the Trial Judge had contributed $750 to the President Judge's election campaign.

At the September 16, 1987 sentencing, the Trial Judge told Petitioner his sentence which involved a $5,000 fine was punishment for his vigorous resistance.

Petitioner objected, without success, at the sentencing and in a "Motion to Revoke, Modify and Change Sentence and Grant Reconsideration–".

In denying the Motion, the Trial Judge gave as his reason "because of the large number of spurious motions and petitions that were filed not only in this case but in what might be termed companion-type litigation and I thought then and I still think that parties and lawyers need to be discouraged from wasting the court's time and wasting taxpayers' money" (782-a to 783-a, Superior Court Appendix).

The issue was raised in Petitioner's Superior Court Brief and Petition for Discretionary Review in the Pennsylvania Supreme Court where it was rejected (see Pages

27-31 which make reference to how and where the issue was raised in the Trial and Superior Courts; see attached Superior Court Opinion for rejection of issue, pages 9-12).

In sum, the three issues raised in this Petition for Certiorari were rejected by the Trial Court, the Superior Court of Pennsylvania and the Supreme Court of Pennsylvania in its denial of discretionary review where Petitioner objected to Superior court findings being contrary to the record and cited trial transcript testimony and objected to the general method of appeal adjudication (Pages 102-113).

REASONS FOR ALLOWANCE OF WRIT OF CERTIORARI

I. WHEN A CRIMINAL PROSECUTOR REMOVES ALL BLACKS FROM THE TRIAL JURY, DOES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT REQUIRE A PROTESTING WHITE DEFENDANT'S CONVICTION BE VACATED WITHIN THE MEANING OF *HOLLAND v. ILLINOIS*, JANUARY 22, 1990, ___ US ___, 110 S. CT. 803?

The Trial Assistant District Attorney used two of his peremptory challenges to remove the only two Blacks from Petitioner's Jury. Petitioner made an immediate protest (T11-15; 278-a to 285-a) which the Trial Judge overruled (T18; 285-a).

Petitioner preserved this issue in his post-conviction motion (Paragraph AD; 527-a) and his "Petition for Complete Jury List Information Sheets" (Paragraphs 12, 13; 535-a).

He further protested in his Superior Court Brief (Pages 89-96); Pages 13-14 of his Superior Court Application for Reargument and in his Supreme Court Petition for Review (Pages 20-27); his Petition for Leave to Amend and his Petition for Reconsideration, both of which cited *Holland v. Illinois*, January 22, 1990, ___ US ___, 110 S. Ct. 803.

On this issue, the Trial Judge said (Opinion, page 3) "the only matter brought to the Trial Judge's attention was the Assistant District Attorney's exercise of peremptory challenges to remove two Black Jurors. The Defendant objected to these challenges for the reason that it deprived him of a fair representation of the community on his Jury. Although not entirely clear, we believe the Defendant's objection is that he was deprived of a cross section of the community because of racial discrimination. This is absurd. The Defendant himself is White. Therefore, the Prosecutor did not exercise peremptory challenges to remove members of the Defendant's race."

The Superior Court opinion affirmed (Pages 18-20) and said – "These claims are without merit, and since these issues have been adequately addressed by the Trial Court, we will rely on that court's disposition of these questions."

The Supreme Court of Pennsylvania denied all three positions without comment or opinion.

Petitioner has printed the relevant to this issue portions of his motion for reconsideration after the opinion.

Petitioner respectfully urges this highest court to apply *Holland v. Illinois* to Petitioner's case and vacate his conviction and sentence.

II. WHEN THE NON-TRIAL PRESIDENT JUDGE OF THE COURT WHERE A CRIMINAL DEFENDANT IS BEING PROSECUTED SECRETLY COMMUNICATES WITH THAT STATE'S HIGHEST JUDICIAL COURT WHEN PART OF THE CASE IS SUB JUDICE AND ALSO REFUSES TO GIVE THE DEFENDANT INVOLVED A COPY OF WHAT HE WROTE AND/OR A STATEMENT OF WHAT HE SAID, HAS THE CRIMINAL DEFENDANT BEEN DEPRIVED OF A FAIR TRIBUNAL AND/OR THE APPEARANCE OF JUSTICE AND/OR HUMANE GUARANTEED RIGHTS?

The President Judge was not the Trial Judge. He secretly communicated with the Supreme Court of Pennsylvania about Petitioner's case and refused to give him a copy of this communication or advise if others has also been made to that and other adjudicating courts.

He took charge of the post-conviction argument heard by the entire active Judge complement and signed the July 6, 1987 Opinion denying relief.

After the admitted original contact, the Supreme Court of Pennsylvania refused Petitioner's claims including the one that had been pending on claims for special relief when the original President Judge secret contact was made.

Petitioner respectfully suggests and urges this highest court to rule that approval of what the President Judge did undermines the entire American concept of

justice and to vacate his conviction and sentence because of it; *U.S. v. Gomez*, 1989, ___ US ___, 109 S. Ct. 2237, 2248 ("the right to an impartial adjudication be it Judge or Jury" is guaranteed and taking it away can never he harmless); *Willner v. Committee on Character and Fitness*, 1963, 373 US 96, 101, 105 106, 83 S. Ct. 1175, 1179, 1181; *Greene v. McElroy*, 1959, 360 US 474, 479 and N.25, 79 S. Ct. 1400, 1405 and N.25; *U.S. ex rel Accardi v. Shaughnessy*, 1954, 347 US 260, 74 S. Ct. 499 (subtle suggestion by Attorney General); *Wheat v. U.S.*, 1988, 108 S. Ct. 1692, 1697, ___ US ___ (proceedings must appear fair to those who observe them); *Vasquez v. Hillery*, 1986, 474 US 254, 263, 106 S. Ct. 617, 623; *Patterson v. McLean Credit Union*, 1988, ___ US ___, 108 S. Ct. 1419, 1421 (law to be applied equally regardless of who is involved); *Burger King Corp. v. Rudzewicz*, 1985, 105 S. Ct. 2174, 2190, 471 US 462, 487 ("courts must not be "blind" to what all others can see and understand"); *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 1968, 393 US 145, 150, 89 S. Ct. 337, 340.

Also, ex parte judicial discussions, even if they have no effect, are universally condemned and may be subject to severe sanctions; *U.S. v. Kahaner*, 1963, C.A.2, 317 F.2d 549 (Judge who attempted to influence another Judge convicted of obstructing justice); *U.S. v. Manton*, 1938, C.A.2, 107 F.2d 834, 836 (fact decision correct irrelevant); *Hastings, Judge, v. Judicial Conference of the United States*, 1987, C.A.D.C., 829 F.2d 91, 95, N.12 (ex parte contact with law clerks); *U.S. v. Holzer*, 1987, C.A.7, 816 F.2d 304 (Judge who does it has affirmative duty to disclose).

III. DO THE FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES PROHIBIT PUNISHMENT OF A CRIMINAL DEFENDANT BECAUSE HE LEGALLY AND PROPERLY RESISTED A STATE SHAKEDOWN WHICH SPECIFICALLY USED ITS CRIMINAL COURTS IN AN ATTEMPT TO FORCE HIM TO PAY 50 TIMES THE ALLEGED VICTIM'S LOSS TO AVOID PROSECUTION?

At the trial, the alleged victim admitted (353-a to 356-a) he brought this prosecution for the sole purpose of collecting $10,000 for a dog he had just purchased on September 10, 1985 (two months previously) for $200 (709-a, 726-a) and would withdraw it (353-a to 355-a) if Petitioner paid him that amount for the animal shot by Petitioner on November 29, 1985.

Not only did the District Attorney affirmatively aid this project (233-a, 706-a to 707-a) but the Trial Judge said it was a usual Beaver County event (234-a, 706-a).

At the September 16, 1987 sentencing, the victim, the District Attorney and the Trial Judge cooperated in what ended in failure to obtain the $10,000 in a surprise day of sentence restitution proceeding when the victim admitted on cross-examination he had only paid $200 (726-a) under vague circumstances (705-a to 708-a) but not before the Trial Judge first tried to chill Defense Counsel by a threat of contempt (707-a, 708-a).

Petitioner was immediately then sentenced to two years probation, payment of $200 restitution plus court costs and the maximum of $5,000 allowed fine as a term of his probation.

Petitioner's federal constitutional objections (5th, 6th, 8th and 14th Amendments) were raised at once and continued in his "Motion to Revoke, Modify and Change Sentence and Grant Reconsideration" (758-a to 776-a), where he raised the issues of prohibited vindictive sentencing (761-a to 763-a), punishment for exercise of accepted constitutional rights (763-a, 764-a) and excessive fine provisions of the eighth and fourteenth amendments (765-a).

He persisted in his Superior Court Brief (Pages 12-15); his Petition for Reargument (Pages 2-3) and in his Supreme Court of Pennsylvania Petition for Discretionary Review (Pages 6, 27-31).

Petitioner respectfully urges this highest court to rule that he cannot be punished for resisting use of the criminal courts as an illegal collection agency; *North Carolina v. Pearce*, 1969, 395 US 711, 89 S. Ct. 2072; *U.S. v. Goodwin*, 1982, 457 US 368, 372, 102 S. Ct. 2485, 2488 (Defendant can't be punished for exercise of protected constitutional right); *Maness v. Meyers*, 1975, 95 S. Ct. 584, 595, N.7 and 16, 419 US 449, 459, N.7 and 16; *In Re Primus*, 1978, 436 US 412, 431, 98 S. Ct. 1893, 1904 (litigation advances civil liberties, political expression and communication of useful information to the public); *Young v. U.S. ex rel Vuitton*, 1987, 481 US 828, 107 S. Ct. 2124, 2138.

CONCLUSION

This case overrules basic legal ideas that have been accepted without qualification as fundamental to the American system of criminal justice.

Unless what this highest court has said are just public relations announcements made on a selected basis, Petitioner respectfully urges his conviction and sentence be set aside; see concurring opinion of Mr. Justice Jackson in *Edwards v. California*, 1941, 314 US 160, 186, 62 S. Ct. 164, 172 ("a promise to the ear to be broken to the hope, a teasing illusion like a munificent bequest in a pauper's will").

Respectfully Submitted,

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MOTION FOR RECONSIDERATION AND FOR LEAVE TO FILE APPLICATION FOR POST-CONVICTION RELIEF IN ALLEGHENY COUNTY, PENNSYLVANIA

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF PENNSYLVANIA:

The Petition of Louis A. LaRaia respectfully represents:

1. That a petition for allowance of appeal was filed in this High Court on the 27th day of March, 1989.

2. On February 28, 1990, Petitioner filed the attached petition for leave to amend.

3. By the attached Order of March 19, 1990, both petitions were denied.

4. Since the original March 27, 1989 petition was filed, the following events occurred:

A. The United States Supreme Court decided *Holland v. Illinois*, January 22, 1990, ___ US ___, 110 S. Ct. 803 which advised a white defendant can raise use of the Prosecutor to get rid of black jurors by use of peremptory challenges.

(1) *Holland* is a twin and identical to LaRaia.

(2) The decision should be applied to pending cases; *Riddick v. Edmiston*, January 16, 1990, C.A.3, 894 F.2d 586, 592, N.8; citing *Griffith v. Ky*, 1987, 479 US 314, 322, 107 S. Ct. 708, 716.

PETITION FOR LEAVE TO AMEND PETITION FOR ALLOWANCE OF APPEAL AND BRING BRIEF UP TO DATE BY CITATION OF JUST PUBLISHED CASE AUTHORITY

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF PENNSYLVANIA:

Louis A. LaRaia respectfully represents:

1. That on March 27, 1989, he filed his petition for allowance of appeal from the February 23, 1989 denial of en banc reargument or reconsideration of the December 22, 1988 Superior Court of Pennsylvania panel decision which, at #1480 Pgh 1987, affirmed his September 16, 1987 sentence (as amended October 7, 1987) in the Court of Common Pleas of Beaver County, Pennsylvania at #599 of 1986 after a jury convicted him of cruelty to animals in violation of 18 P.S. 5511.

2. That on February 26, 1990, the Allegheny County Law Library placed in its shelves West's Supreme Court Reporter, Volume 110, No. 8 which your Petitioner's Counsel read that day.

3. This advance sheet contained *Holland v. Illinois*, decided January 22, 1990, 110 S. Ct. 803 which held that a white defendant had an absolute federal constitutional right to object to prosecutor's use of peremptory challenges to remove Black Trial Jurors but waived it because the issue was presented under the Sixth Amendment instead of the equal protection clause of the Fourteenth Amendment (110 S. Ct. at 811 and N.3; see also concurring opinion of Justice Kennedy at Page 811).

4. The five Justice majority opinion clearly advised:

A. "The threshold question is whether Petitioner, who is White, has standing to raise a Sixth Amendment challenge to the exclusion of Blacks from his Jury. We hold that he does." (110 S. Ct. at 805) and

B. "We do not even hold that the exclusion of Blanks through peremptory challenges in this particular trial was lawful. Nor do we even hold that this particular (White) defendant does not have a valid constitutional challenge to such a racial exclusion. All we hold is that he does not have a valid constitutional challenge based on the Sixth Amendment-" and

C. "Since only the Sixth Amendment claim and not the equal protection claim is at issue" Defendant has not properly preserved this issue in any court including the Supreme Court of the United States.

D. N.3 specifically advised "As noted at the outset, Petitioner did not seek review of the denial of his Equal Protection clause claim. Our grant of certiorari was limited to the Sixth Amendment question, and the equal protection question has been neither brief nor argued" (110 S. Ct. at 811).

E. Justice Kennedy concurs, joins the opinion and further advises "Like Justice Marshall, I find it essential to make clear that if the claim here were based on the Fourteenth Amendment equal protection clause, it would have merit" (110 S. Ct. 811).

4. Petitioner's March 27, 1989 petition for review raises this issue beginning at Page 20 to 27 where he also makes specific references to his objections in the trial court and the Trial Judge's July 6, 1987 opinion denying a

new trial (619-a to 621-a) where he said (620-a) that since Petitioner was White and the Jurors Black, his objection "is absurd" (620-a):

A. Petitioner's statement of the issue for review is:

"THE IMPROPER ASSISTANT DISTRICT ATTORNEY REMOVAL OF TWO BLACK JURORS FROM THE ORIGINAL TWELVE MEMBER PANEL VIOLATED STATE AND FEDERAL CONSTITUTIONAL MANDATES."

B. The question was so stated in compliance with Pa. R.A.P. 1115 (a)(3) which advises the petition for review shall contain "the questions presented for review, expressed in the terms and circumstances of the cases but without unnecessary detail. The statement of questions presented will be deemed to include every subsidiary question fairly comprised therein-".

C. In order to avoid any risk of waiver, Petitioner respectfully asks to add to the above question the words "and, in particular, the equal protection clause of the Fourteenth Amendment".

5. Petitioner preserved this issue in his Motion for a New Trial (527-a) where he relied upon "Article 1, Sections 1, 9, 25 and 26 of the Pennsylvania Constitution and/or the 1st, 5th, 6th and 14th Amendments to the United States Constitution". See also 535-a ("Petition for complete Jury List Information Sheets", Paragraphs 12, 13).

6. He Briefed the issue in his Post-Verdict Brief for the Beaver Court en Banc (804-a) where he cited "the Fifth, Sixth and Fourteenth Amendments to the United

States Constitution" and later discussed law and facts (810-a to 815-a) with reference to how the issue was raised before the trial began (810-a referring to T11-18 of the trial transcript reproduced at 278-a to 285-a and saying (283-a) "Mr. LaRaia has a right to have Black people on the Jury even though he himself is not Black").

7. The issue was further preserved in Petitioner's Superior Court Brief (872-a) where he raised "the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and made his argument at 877-a to 884-a.

A. The Beaver County en banc opinion (887-a to 888-a) rejects this argument.

B. The Superior Court of Pennsylvania also rejects it (916-a) because "These claims are without merit" with reliance on the Trial Court's disposition.

WHEREFORE, Petitioner respectfully requests the above amendment be allowed.

SUPERIOR COURT OF PENNSYLVANIA

PITTSBURGH DISTRICT

COMMONWEALTH OF PENNSYLVANIA	)	
	)	NO. 1480
VS.	)	PITTSBURGH,
	)	1987
LOUIS A. LARAIA, APPELLANT	)	

ORDER

AND NOW, this 22nd day of DECEMBER, 1988, it is ordered as follows:

_ Order affirmed.

_ Order Reversed.

_ Judgment affirmed.

X Judgment of Sentence affirmed.

_ Judgment of Sentence reversed.

_ Order vacated and lower court directed to proceed in accordance with opinion filed herewith.

_ Order modified as set forth in opinion filed herewith.

_ Costs to be taxed as provided by Chapter 27 of the Pa.R.A.P.

_ Costs to be taxed as provided in opinion filed herewith.

_ Appeal quashed.

BY THE COURT

Eleanor R. Valecko
DEPUTY PROTHONOTARY

This copy is a true and correct copy of the original on file in this Office. Witness my hand and official seal.

This 10th day of May 1990
Judy R. Enslen
Clerk of Courts

By Angela Mennetta Dep. Clerk

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
LOUIS A. LARAIA, Appellant	:	No. 1480 Pittsburgh 1987

Appeal from the Judgment of Sentence of the Court of Common Pleas of Beaver County, Criminal Division, No. 599 of 1986 dated September 16, 1987.

BEFORE: BROSKY, JOHNSON AND MELINSON, JJ.

MEMORANDUM: FILED: DECEMBER 22, 1988

Appellant, Louis LaRaia, appeals from the judgment of sentence of the Court of Common Pleas of Beaver County. The judgment of sentence is affirmed.

LaRaia was convicted by a jury of violating 18 Pa. Cons. Stat. Ann. Section 5511(a) (Purdon 1987 Supp.).[1] Post trial motions were filed and denied. This appeal followed.

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[1] 18 Pa. Cons. Stat. An. Section 5511(a) (Purdon 1987 Supp.), entitled "Cruelty to animals," provides as follows:

> (a) Killing, maiming or poisoning domestic animals or zoo animals, etc. –
>
> (1) A person commits a misdemeanor of the second degree if he willfully and maliciously kills, maims or disfigures any domestic animal of another person or any zoo animal in captivity, or willfully and maliciously, administers poison to any such domestic or zoo animal, or exposes any poisonous substance, with intent that the same shall be taken or swallowed by animals, fowl or birds.

A brief discussion of the facts of this case will assist in developing an understanding of the issues raised in this appeal. The facts adduced at trial show that on November 29, 1985, James McClurg and two companions were "coon (raccoon) hunting." Each of the hunters was accompanied by his own coon dog. At approximately 10:00 P.M., the hunters heard McClurg's dog tracking across a corner of LaRaia's property.[2] The hunters heard a shot and then heard the dog yelping. They then heard a second shot. The dog ceased yelping and no further sound was heard from it. The hunters then contacted the police.

Officer Robert Phillip, of the Hanover Township Police Department, responded to the call. He first spoke to the hunters, then proceeded to LaRaia's house to investigate the shots. In the course of his investigation Officer Phillip spoke with LaRaia. When asked if he had shot a dog, LaRaia replied that he had shot at something. He further explained, when asked, that "something" was attacking his steer. He turned on a flood light, saw "some kind of stray or animal . . . trying to get in where my steer was," retrieved his shotgun from the house, and shot at the dog. LaRaia testified that he first shot at the dog with the intention of frightening it. Unfortunately, this warning shot struck the dog in the rear quarters. After this first shot, according to LaRaia, the dog turned and started toward the porch where LaRaia was standing. Allegedly fearing that the dog would bite him, and wishing to put

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[2] McClurg testified that he had hunted for about fifty-six (56) years and that he knew the difference between the sound of a dog tracking and the sound of a dog "treeing a coon."

the dog out of its misery, LaRaia shot the dog a second time. LaRaia told Officer Phillip that the dog ran into the woods after being shot the second time.

After speaking to LaRaia, Officer Phillip inspected the area where LaRaia kept his steer. He found the steer, unharmed, standing still within its pen. He examined the three-foot high fence which completely surrounded the steer and found it to be in good condition. The fence was not bent or torn or damaged in any other manner. The dog's body was found on the opposite side of LaRaia's house from the location of the steer pen.

LaRaia was found guilty by a jury of cruelty to animals. 18 Pa. Cons. Stat. Ann. Section 5511(a) (Purdon 1987 Supp.). He was sentenced by the Honorable Robert E. Kunselman of the Court of Common Pleas of Beaver County to two (2) years' probation and ordered to pay the costs of prosecution, a fine in the amount of Five Thousand Dollars ($5,000.00), and Two Hundred Dollars ($200.00) in restitution to the owner of the dog.

LaRaia raises eight (8) issues on appeal. LaRaia states the issues as follows:

I. SHOULD A Pa. R.A.P. 2119 (b) SENTENCE APPEAL BE ALLOWED AND THE SENTENCE SET ASIDE?

II. WAS APPELLANT CONVICTED OF A CRIME NOT OR IMPROPERLY CHARGED AND/OR WITHOUT PROOF AND, IF NOT, WHERE HIS FEDERAL AND STATE RIGHTS TO A FAIR TRIAL DESTROYED BY IMPROPER DISTRICT ATTORNEY ARGUMENTS AND/OR COURT INSTRUCTIONS TO THE JURY?

III. APPELLANT'S CONVICTION OF A CHARGE NOT MADE OR PASSED BY THE GENERAL ASSEMBLY SHOULD BE REVERSED.

IV. WHEN THE PRESIDENT JUDGE OF A JUDICIAL DISTRICT PARTICIPATES AS A COMMONWEALTH ADVOCATE, SHOULD THE VENUE OF A CRIMINAL CASE BE SENT TO THE CHIEF JUSTICE FOR REASSIGNMENT?

V. DID THE MAY 27, 1986 (38-a TO 65-a) BINDING OVER THE COURT TRIAL WITHOUT REQUESTED BENEFIT OF PRELIMINARY HEARING COUNSEL DEPRIVE APPELLANT OF ARTICLE 1, SECTION 9 AND SIXTH AND FOURTEENTH AMENDMENT "CRITICAL STAGE" PROTECTION?

VI. SHOULD THE EVIDENCE OF DEFENDANT'S NOVEMBER 29, 1985 STATEMENTS AND THE RESULTS OF THE SEARCH MADE THAT NIGHT HAVE BEEN SUPPRESSED AS A VIOLATION OF THE FOURTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION PLUS ARTICLE 1, SECTIONS 8 AND 9 OF THE PENNSYLVANIA CONSTITUTION.

VII. WHEN THE ALLEGED VICTIM OF A CRIME ADMITS ON THE STAND THAT HIS SOLE PROSECUTION PURPOSE WAS A FIFTY TIMES HIS CLAIMED LOSS SHAKEDOWN AND THE DISTRICT ATTORNEY AFFIRMATIVELY PURSUES THIS OBJECTIVE WITH FULL KNOWLEDGE OF THE TRIAL COURT, SHOULD THE PROSECUTION BE DISMISSED AS A MATTER OF PUBLIC POLICY?

VIII. DOES A JURY SELECTION IN WHICH THE PROSPECTS ARE NOT FIRST SWORN, THE TRIAL JUDGE REFUSES TO PRESIDE AND ALL BLACKS ARE REMOVED VIOLATE Pa. R.Cr.P. [sic] 1106 AND DEPRIVE DEFENDANT OF HIS STATE AND FEDERAL RIGHT TO BE TRIED BY A FAIR CROSS-SECTION OF THE COMMUNITY.

I

Should a Pa.R.A.P. 2119(b) sentence appeal be allowed and the sentence set aside?

The first issue raised by LaRaia, apparently, is a challenge to the discretionary aspects of his sentence. Initially, we note that LaRaia has not complied with the technical requirements of Pa.R.A.P 2119(f), as enunciated in *Commonwealth v. Tuladziecki*, 513 Pa. 508, 522 A.2d 17 (1987).[3]

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[3] We further note that LaRaia has failed to comply with several of the Pennsylvania Rules of Appellate Procedure with respect to the contents of his brief. He includes nine (9) different Orders in the section entitled "ORDER OR OTHER DETERMINATION IN QUESTION." The only Order from which LaRaia can appeal is from the Judgment of Sentence of the trial court. The inclusion of any other Order is improper. Pa.R.A.P. 2115. LaRaia further violates the rules by including irrelevant and argumentative statements in his Statement of the Case. Pa.R.A.P. 2117(b). Moreover, his brief is ninety-six (96) pages long, a direct violation of Pa.R.A.P. 2135.

We do not condone LaRaia's blatant disregard of the Rules. However, rather than quash this appeal under Pa.R.A.P. 2101, we have decided to address its merits. Counsel for LaRaia is hereby admonished for his violation of the Rules of Appellate Procedure when preparing LaRaia's brief.

There is no absolute right of appeal from the discretionary aspects of a criminal sentence. The allowance of such an appeal is discretionary with the Superior Court. 42 Pa. Cons. Stat. Ann. Section 9781(b) (Purdon 1982). Pa.R.A.P. 2119(f) mandates that an appellant who challenges the discretionary aspects of a sentence must set forth in his brief a concise statement of the reasons relied upon for allowance of appeal. Only when it appears that there is a substantial question that the sentence imposed is not appropriate will an appeal be allowed and the discretionary aspects of the sentence reviewed. 42 Pa. Cons. Stat. Ann. 9781(b) (Purdon 1982). A failure to include a concise statement, as required by Pa.R.A.P. 2119(f), renders the appeal defective. *Commonwealth v. Tuladziecki*, 513 Pa. 508, 522 A.2d 17 (1987). The defect is procedural, however, and may be waived by the appellee. *Commonwealth v. Krum*, 367 Pa.Super. 511, 533 A.2d 134 (1987). In such cases, the Superior Court will determine for itself whether appellant has presented a substantial issue regarding the alleged inappropriateness of the sentence. *Commonwealth v. Krum*, 367 Pa.Super. at 520, 533 A.2d at 138.

In the instant case, LaRaia has failed to include a concise statement of reasons relied upon for allowance of an appeal from the discretionary aspects of the sentence imposed.[4] However, because the Commonwealth has not objected to this omission, the defect has been waived.

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[4] LaRaia purports to comply with the requirements of Pa.R.A.P. 2119(f) by couching the first issue raised in his appeal in language intended to give the appearance of a Rule 2119(f)

(Continued on following page)

We have exercised our discretion in this case and reviewed LaRaia's brief to determine whether he has presented a substantial question which would require this court to review the discretionary aspects of the sentence imposed by the trial court. *See Commonwealth v. Krum*, 367 Pa.Super. at 520, 533 A.2d at 138. LaRaia charges that he was not notified that evidence would be taken at his sentencing hearing to determine his ability to pay a fine as punishment for the crime for which he was convicted. He further alleges that the sentence imposed by the trial court was vindictive and in retaliation for LaRaia asserting his constitutional rights during the course of his trial.[5]

LaRaia's allegation that he was not notified that evidence would be presented at the sentencing hearing to permit the trial judge to determine LaRaia's ability to pay

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(Continued from previous page)

"concise statement." However, LaRaia failed to include such a statement in a separate part of his brief. He, apparently, incorporated the reasons for allowance of appeal into the section of his brief devoted to argument of the first issue raised. This practice does not bring LaRaia into compliance with the specific requirements of Rule 2119(f).

[5] LaRaia also requests "this Court of Appeals to rule that the elaborate McClurg and District Attorney plans to present what turned out to be a false case require the sanction of no restitution at all;. . . . " This, apparently, is the same allegation of error that is raised by LaRaia in his second argument. In the context of a challenge to the discretionary aspects of sentence, it is without merit. The judge is free to order restitution, where appropriate, when a jury has convicted the defendant of the crime with which he was charged. 18 Pa. Cons. Stat. Ann. Section 1106 (Purdon 1983). 42 Pa. Cons. Stat. Ann. Section 9721(c) (Purdon 1982).

a fine is without merit. The Pennsylvania Sentencing Code clearly provides for imposition of fines where the trial court finds that a fine is appropriate and that the defendant is able to pay a fine. 42 Pa. Cons. Stat. Ann. Section 9726 (Purdon 1982). The legislature has further provided that the court shall, prior to imposition of a fine, determine that the defendant is able to pay the fine and that "the fine will not prevent the defendant from making restitution or reparation to the victim of the crime." 42 Pa. Cons. Stat. Ann. Section 9726(c) (Purdon 1982). LaRaia and his counsel need only have researched the Sentencing Code, a task which should have been performed by both parties prior to sentencing in any case, to have learned that the judge would make a determination at sentencing with regard to LaRaia's ability to pay a fine. The Pennsylvania legislature has notified the public, through the publication of duly promulgated statutes, of the possible punishments for engaging in various types of criminal conduct. The legislature has further notified the public of the factors that will be considered by the courts in imposing punishment. This notification is through publication of the various duly enacted statutes found in the Pennsylvania Statutes and the Pennsylvania Consolidated Statutes. Thus, we find that LaRaia had sufficient notice of the duty of the court to consider evidence of his ability to pay a fine as part of his sentence. Hence, LaRaia has not presented a substantial question which requires us to review the discretionary aspects of his sentence with regard to the issue of restitution.

However, LaRaia also challenges the discretionary aspects of his sentence with regard to the fine imposed by the trial court. Specifically, he charges that the trial court

imposed "prohibited vindictive sentencing, punishment for exercise of accepted constitutional rights and the excessive fine provisions of the 8th and 14th Amendments plus Article 1, Section 13 of the Pennsylvania Constitution, improper conviction for a crime with which he was not charged[6] and for conduct legislation had advised was justified."[7]

LaRaia has not raised a substantial question with regard to this charge that his sentence violated the "excessive fine provisions of the 8th and 14th Amendments plus Article 1, Section 13 of the Pennsylvania Constitution." The Pennsylvania legislature has provided for a maximum fine of $5,000.00 for convictions of misdemeanors of the second degree. 18 Pa. Cons. Stat. Ann. Section 1101(4) (Purdon 1983). A person who is convicted of violating 18 Pa. Cons. Stat. Ann. 5511(a) (Purdon 1987 Supp.) has been convicted of a misdemeanor of the second degree. LaRaia has failed to point out how the trial court abused its discretion and violated the United States and Pennsylvania Constitutions by imposing a fine

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[6] This, apparently, is the same argument that LaRaia sets forth in the second issue raised in his brief. We will not address the issue of an improper charge or conviction as a challenge to the discretionary aspects of sentence, as this is not the proper posture for such a challenge.

[7] LaRaia's charge that his conduct has been justified by the Legislature of the Commonwealth of Pennsylvania is, in reality, the same argument that he has set forth in his second issue with respect to the trial court's instructions to the jury; i.e. whether the trial court should have instructed the jury that the Commonwealth had to prove lack of justification. We will not address that issue as a challenge to the discretionary aspects of sentence.

already approved by the legislature. Hence, we will not address the merits of this claim.

LaRaia's final challenge to the discretionary aspects of his sentence is that the court abused its discretion by engaging in "prohibited vindictive sentencing," i.e. the sentence imposed was more harsh than it otherwise would have been, had LaRaia not exercised his constitutional rights. Specifically, LaRaia is claiming that the trial court imposed the maximum sentence[8] because LaRaia filed many motions during the course of the proceedings below and the sentence imposed was in retaliation for the filing of these motions. We find that this raises a substantial question, and we will review the record for an abuse of discretion by the trial court in sentencing LaRaia.

This court has noted that:

> [S]entencing is a matter within the sound discretion of the sentencing judge and a sentence will not be disturbed by an appellate court absent manifest abuse. A sentence must either exceed the statutory limits or be manifestly excessive to constitute an abuse of discretion. *Commonwealth v. White*, 341 Pa.Super. 261, 491 A.2d 252 (1985). A sentencing judge's discretion must be accorded great weight as he is in the best position to weigh various factors such as the nature

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[8] A sentence of total confinement, as opposed to a probationary period or a period of partial confinement, is considered to be a more harsh sentence under the Sentencing Code, 42 Pa. Cons. Stat. Ann. Sections 9701 *et seq.* (Purdon 1982). *See Commonwealth v. Cooper*, 319 Pa.Super. 351, 466 A.2d 195 (1983); *Commonwealth v. Long*, 310 Pa.Super. 339, 456 A.2d 641 (1983). Hence, LaRaia's sentence was not the most harsh sentence available to Judge Kunselman at sentencing.

> of the crime, the defendant's character, and the defendant's displays of remorse, defiance, or indifference. *Commonwealth v. Duffy*, 341 Pa.Super. 217, 491 A.2d 230 (1985).

Commonwealth v. Fries, 362 Pa.Super. 163, 167, 523 A.2d 1134 (1987). We note that LaRaia's sentence does not exceed the statutory limits. We further find that the sentence is not manifestly excessive so as to constitute an abuse of discretion.

During sentencing, the trial court noted that, some people had referred to this case as "just a case where a dog was killed." The court went on to note, however that:

> [T]he Pennsylvania Legislature in its infinite wisdom has said it is a misdemeanor of the second degree to kill or maim a domestic animal and so those who speak for all of us as citizens of this Commonwealth have determined that it is a serious matter, . . .

(N.T. September 16, 1987, p. 43, 44). Thus, the trial court took cognizance of the nature of the crime and the gravity with which the people of Pennsylvania, through the legislature of this Commonwealth, view the type of behavior of which LaRaia was convicted. The court further noted that up until the time of the incident which resulted in LaRaia's conviction here under consideration, he had been, as near as the court could tell, a model citizen. Hence, the court felt that a period of incarceration was not necessary "either for rehabilitation purposes or to avoid the unnecessary depreciation of the seriousness of the offense." (N.T. September 16, 1987, p. 44). The court chose to impose a fine in the amount of $5,000.00. The trial court noted that the fine "at least ought to be high enough to impress upon the Defendant that he did do

something wrong and to pay for that wrong, . . . " (N.T. September 16, 1987, p. 45). The court went on to state that there was a "multitude of what I deem to be superfluous motions and petitions filed not only in this case but collateral matters . . . ," and that it felt that that type of conduct should be deterred "to the extent we can." (N.T. September 16, 1987, p. 45).

On October 7, 1987, a hearing on LaRaia's motion for reconsideration of sentence was held before Judge Kunselman. At that hearing, on the record, for the benefit of this court, Judge Kunselman explained his reasons for LaRaia's sentence. The judge noted that LaRaia continually failed to appear for both his arraignment and his preliminary hearing. He refused to execute an "ROR bond," and then filed a writ of *habeas corpus* when he was detained. He refused to be interviewed for the pre-sentence report. The court also noted the multitude of issues raised by the defense that prevented the timely progress of this case through the criminal justice system. It remarked on the difficulties encountered in bringing this case to trial because of the defendant's insistent attempts to thwart the judicial process as it has been established by the Constitution of the Commonwealth of Pennsylvania, the Legislature of the Commonwealth of Pennsylvania and the Supreme Court of the Commonwealth of Pennsylvania.

The reasons stated by the trial court for imposing a $5,000.00 fine on LaRaia are all valid reasons. LaRaia was not exercising his constitutional rights by simply defending himself, he was attempting to circumvent the orderly progression of criminal justice. LaRaia's action cannot be ascribed to his counsel. He, himself, chose not to appear

for scheduled court dates. He chose to refuse to cooperate with court officials. He further authorized all actions taken on his behalf by counsel. We will not now hear counsel argue that he will take responsibility for his client's actions. A defendant's display of remorse, defiance, or indifference are proper considerations for the trial court at sentencing. *See Commonwealth v. Fries*, 362 Pa.Super. 163, 523 A.2d 1134 (1987). The trial court properly considered LaRaia's defiant attitude toward the court's authority and his indifference to the fact that he had broken a law of this Commonwealth. We find no abuse of discretion by the trial court in imposing sentence in this case.

II

Was Appellant convicted of a crime not or improperly charged and/or without proof and, if not, were his federal and state rights to a fair trial destroyed by improper District Attorney arguments and/or court instructions to the jury?

LaRaia, apparently, here claims that the information charging him under 18 Pa. Cons. Stat. Ann. Section 5511(a) was improper, that the evidence was insufficient to convict him under that statute, that the jury was prejudiced by improper remarks by the District Attorney, and that the trial court erred when it instructed the jury on the law to be applied in this case. We find the trial court's cogent discussion of these arguments to be an adequate explication of the law; hence, we rely on that court's disposition of these issues.

III

Appellant's conviction of a charge not made or passed by the General Assembly should be reversed

LaRaia has raised this issue for the first time on appeal.[9] Hence, we find that this issue has not been properly preserved for appellate review.[10] *See Commonwealth v. Kelly*, 365 Pa.Super. 28, 528 A.2d 1346, *appeal denied* 517 Pa. 598, 535 A.2d 105 (1987).

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[9] If we were to address this issue we would find that it is without merit. LaRaia was charged with cruelty to animals by willfully and maliciously killing, maiming or disfiguring a domestic animal. His claim that he was convicted of the "justified shooting of a coon dog which comes on Defendant's posted against trespass land located in a deserted area at 10:30 PM when the dog is running free in violation of Sections 305 and 501 of the Dog Law and enters the prohibited safety zone of 34 PS 1311.808 and subsequently refusing to pay off in a $10,000 shakedown for the $200 dog" is ludicrous. This seems to be a combination argument that the evidence was insufficient to convict of cruelty to animals and that the jury was improperly charged. LaRaia was convicted, by a jury, after a full trial on all of the evidence, including his justification defense. Further, as noted by the trial court, he was properly charged and the jury was fully instructed with regard to the interaction of the Dog Law and the Penal Code.

[10] We note that, again, on this issue, LaRaia's brief is not a model of clarity. He includes in this section of his brief, arguments with regard to the information and jury instructions. These claims have been addressed and disposed of under Section II of this Memorandum in accordance with the trial court's disposition of those issues.

IV

When the president judge of a judicial district participates as a commonwealth advocate, should the venue of a criminal case be sent to the Chief Justice for reassignment?

> A litigant must do two things in order to preserve an issue [for appellate review]. First, he must make a timely, specific objection at trial. *Commonwealth v. Williams*, 458 Pa. 319, 326 A.2d 300 (1974). Second, he *must raise the issue in post-trial motions. Commonwealth v. Keysock*, 236 Pa.Super. 474, 345 A.2d 767 (1975).

Commonwealth v. White, 366 Pa.Super. 538, 547, 531 A.2d 806, (1987). Again, LaRaia has raised an issue not addressed in his post-trial motions. Hence, it has not been properly preserved for appellate review.[11] *See Commonwealth v. Kelly*, 365 Pa.Super. 28, 528 A.2d 1346, *appeal denied* 517 Pa. 598, 535 A.2d 105 (1987).

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[11] In any event, this appeal is not the appropriate forum for resolution of the charges raised here by LaRaia. If LaRaia has substantive evidence to prove the slanderous charges asserted in this section of his brief, he should bring such evidence to the attention of the appropriate tribunal. Once again, in this section of his brief, LaRaia has clouded the issues raised on appeal. In addition to the slanderous remarks aimed at various members of the Beaver County Bench, he apparently is challenging the Beaver County Court of Common Pleas' refusal to transfer the venue of this case. As noted in the body of this Memorandum, this issue has not been properly preserved. In his post-trial motions, LaRaia attempts to include this issue by "incorporating" the papers filed in the various motions and proceedings both in the trial court and in other forums. This type of cross-referencing will not preserve an issue for appeal. *See* Pa.R.A.P. 2119. Further, if we were to find

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V

Did the May 27, 1986 (38-a to 64-a) binding over for court trial without requested benefit of preliminary hearing counsel deprive appellant of Article 1, Section 9 and Sixth and Fourteenth Amendment "critical stage" protection?

LaRaia's argument in this section of his brief presents two issues for our consideration. Initially, as noted in the section heading, LaRaia asserts that he was denied the right to counsel at his preliminary hearing, a "critical stage" of the prosecution against him. His argument implies that he is also claiming that he was denied discovery.

LaRaia's claim that he was denied the right to counsel at his preliminary hearing is waived. This issue was not raised in his post-trial motions.[12] *See Commonwealth v.*

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that this issue had not been waived, it is without merit. A review of the transcript from the June 27, 1986 hearing on change of venue reveals that LaRaia had ample opportunity to provide an offer of proof with respect to the damaging charges leveled at the Beaver County Court of Common Pleas Bench. He failed to offer any substantiation for those charges.

[12] In any event, this claim is without merit. The United States Supreme Court has held:

> Whatever else it may mean, the right to counsel granted by the Sixth and Fourteenth Amendments means at least that a person is entitled to the help of a lawyer at or after the time that judicial proceedings have been initiated against – 'whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.' "

(Continued on following page)

Kelly, 365 Pa.Super. 28, 528 A.2d 1346, *appeal denied* 517 Pa. 598, 535 A.2d 105. (1987).

As a part of his claim that he was denied the right to counsel at his preliminary hearing, LaRaia asserts that, as a result, he was denied the right to discovery. Initially, we note that, "[t]he mere fact that the absence of counsel may have deprived the defendant of an opportunity for pre-trial discovery, does not rise to a violation of due process." *United States ex rel. McCoy v. Rundle*, 307 F.Supp. 574 (1969). Further, although Pa.R.Crim.P. 305 requires that the Commonwealth disclose certain information to the defense, Pa.R.Crim.P. 305A requires that:

> Before any disclosure or discovery can be sought under these rules by either party, counsel for the parties shall make a good faith effort to resolve all questions of discovery, and to provide information required or requested under these rules. When there are items requested by one party which the other party has refused to disclose, the demanding party may make appropriate motion to the court. Such motion shall be made within fourteen (14) days after arraignment, unless the time for filing is extended by the court. In such motion the party must set

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Brewer v. Williams, 430 U.S. 387, 398, 97 S.Ct. 1232, 51 L.Ed.2d 424, 436 (1977)(citations omitted). Both the federal courts and the Pennsylvania Supreme Court have held that a preliminary hearing, under Pennsylvania law is not regarded as a critical stage of the criminal proceedings against a defendant. *United States ex rel. McCoy v. Rundle*, 307 F.Supp. 475 (E.D.Pa. 1969), *citing United States ex rel. Maisenhelder v. Rundle*, 349 F.2d 592 (3d Cir. 1965); *Commonwealth ex rel. Perry v. Maroney*, 423 Pa. 547, 225 A.2d 233 (1967).

> forth the fact that a good faith effort to discuss the requested material has taken place and proved unsuccessful. . . .

The record discloses no such good faith effort on the part of LaRaia to resolve any discovery question. LaRaia does not even bother to assert that he ever requested such information from the Commonwealth. It would be absurd to hold that the Commonwealth is required to read a defendant's mind to ascertain the information that a defendant feels he or she needs through discovery in order to prepare a defense.

Further, the rule requires that, in the event that a discovery motion is required, "such motion shall be made within fourteen (14) days after arraignment." Pa.R.Crim.P. 305A. LaRaia was arraigned on April 3, 1986. The only pleading filed that bore any resemblance to a motion for disclosure of discovery material was a part of LaRaia's omnibus pre-trial motion. This motion, filed on July 7, 1986, three (3) full months after LaRaia's arraignment, was a seven (7) page document raising numerous other contentions unrelated to discovery. It included the following language:

> MOTION FOR Pa. R. C. P. 305 MATERIAL
>
> 21. Defendant requests all Pa.R.Cr.P. 305 allowed material including but not limited to favorable evidence and statements plus witnesses names and addresses etc.
>
> WHEREFORE, Defendant requests the above.

We do not consider this a good faith effort to resolve discovery questions. The Commonwealth would be required to guess at the type of information that LaRaia

was requesting. We do not require the Commonwealth to engage in such speculation.

LaRaia asserts that he was denied access to the names of eyewitnesses, to which he was entitled under Pa.R.Crim.P. 305B(2). However, the names and addresses to which LaRaia claims he was entitled were those of the other hunters who were with the dog owner on the night of the shooting. It should be noted, from the facts recited at the beginning of this Memorandum, that there were, with the exception of LaRaia himself, no eyewitnesses to the shooting. In any event, Pa.R.Crim.P. 305B(2) requires "a showing that they [the items to be discovered] are material to the preparation of the defense and that the request is reasonable." LaRaia's motion offered no averments which would show, or tend to show if proven, that the names and addresses in question were material to the preparation of his defense. *See Commonwealth v. Favinger*, 358 Pa.Super. 245, 516 A.2d 1386 (1986). Hence, we find that, again, LaRaia has, apparently, failed to abide by the rules of procedure. The motion in question was untimely filed, it failed to assert facts necessary to support relief, and its filing was not preceded by a good faith effort to resolve the issues.

VI

Should the evidence of defendant's November 29, 1985 statements and the results of the search made that night have been suppressed as a violation of the Fourth and Fourteenth Amendments to the United States Constitution plus Article 1, Sections 8 and 9 of the Pennsylvania Constitution?

We find that the trial court's opinion adequately disposes of this issue; hence, we rely on that court's disposition of LaRaia's assertion that his November 29, 1985

statements and the results of the search made on the same date should have been suppressed.[13]

VII

When the alleged victim of a crime admits on the stand that his sole prosecution purpose was a fifty times his claimed loss shakedown and the District Attorney affirmatively pursues this objective with full knowledge of the trial court, should the prosecution be dismissed as a matter of public policy?

This claim is without merit. LaRaia points to nothing in the record that would support this allegation. Although the owner of the dog did testify that a payment of $10,000.00 would pay for his dog, LaRaia points to nothing that would substantiate a charge that the Commonwealth would discontinue the prosecution upon the payment of a sum of money. The Commonwealth, not the victim, determines whether to pursue a prosecution. The only instances in the record where a payment of money is discussed occur during cross-examination of the owner of the dog. In those instances, defense counsel literally put words in the mouth of the witness and then attempted to force the witness to agree to the truth of the statement. While this may, technically, be considered appropriate cross-examination form, as an officer of the court, counsel must have some basis for asking such a question. In this case, counsel was unable to substantiate the charges. While it certainly would not be unusual for the owner of

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[13] The holdings of the Courts in *In re Casale*, 512 Pa. 548, 517 A.2d 1260 (1986) and *Hayes v. Florida*, 470 U.S. 811, 105 S.Ct. 1643, 84 L.Ed.2d 705 (1985), cited by LaRaia, are inapposite to the case at bar.

the dog to hope to recoup the value of the animal, there is no evidence in the record to support LaRaia's claim that he was prosecuted solely for the purpose of extorting money from him.

If LaRaia is implying that the owner of the dog will benefit by the fine imposed in this case, he is mistaken. The restitution ordered was in the amount of $200.00. The fine, a completely separate penalty, will be paid to the county and not to the victim of the crim.

VIII

Does a jury selection in which the prospects are not first sworn, the trial judge refuses to preside and all blacks are removed violate Pa. R.Cr.P. 1106 and deprive defendant of his state and federal right to be tried by a fair cross-section of the community?

LaRaia claims that prospective jurors were not sworn prior to *voir dire*[14], that the trial court failed to preside over the *voir dire* process, and that the only two black

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[14] LaRaia's claim that the Juror's Qualification Questionnaire employed in Beaver County does not contain a warning that its "execution is subject to the penalty of perjury" as required by 42 Pa. Cons. Stat. Ann. Section 4521(d)(2)(Purdon 1987 Supp.), has been waived. This issue was not raised in LaRaia's post-trial motion. *See Commonwealth v. Kelly*, 365 Pa.Super. 28, 528 A.2d 1346, *appeal denied* 517 Pa. 598, 535 A.2d 105 (1987). Moreover, this claim is without merit. The form in question clearly states that, by signing the form, one swears and affirms that the preceding statements are true and correct to the best of the knowledge of the affiant. Implicit in this oath is the acknowledgment that one will be liable for perjury for false statements. Further, LaRaia has failed to include copies of both sides of the form in question for review by this court.

jurors on the panel were removed by the Commonwealth. These claims are without merit,[15] and since these issues have been adequately addressed by the trial court, we will rely on that court's disposition of these questions.

We find that the numerous issues raised by LaRaia in this appeal are wholly without merit. Hence, the judgment of sentence is affirmed.

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[15] LaRaia asserts in the argument section of his brief regarding Issue VIII, that he was not permitted to be present at the court during selection of the panel from which the jury was chosen. This issue was not raised in post-trial motions; hence, it is waived. In any event, this assertion is without merit. The only jurors who were prospective jurors for his trial were the people who were actually chosen from the full pool of jurors to be questioned with regard to that specific case. Thus, the "impanelling of the jury" for which a defendant has the right to be present, is the impanelling of the prospective jury for his trial.

THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

PROTHONOTARY
IRMA T. GARDNER
DEPUTY PROTHONOTARY

801 City-County Building
Pittsburgh, PA.
15219
(412)565-2816

March 19, 1990

Allen N. Brunwasser, Esquire
P.O. Box 22212
Pittsburgh, PA 15222

In Re: Commonwealth of Pennsylvania v. Louis A. La Raia *No. 168 W.D. Allocatur Docket 1989*

Dear Mr. Brunwasser:

The Court has entered the following Orders on your Petition for Leave to Amend Petition for Allowance of Appeal and Bring Brief up to Date by Citation of Just Published Case Authority and Petition for Allowance of Appeal in the above-captioned matter:

(Petition for Leave to Amend, etc.)
"Denied
3/19/90
Per Curiam"

(Petition for Allowance of Appeal)
"3/19/90
Denied
Per Curiam"

Very truly yours,

/s/ Irma T. Gardner
Irma T. Gardner
Deputy Prothonotary

ITG/dad
cc: Ahmed T. Aziz, Esq.
Honorable Roy E. Kunselman

THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

PROTHONOTARY
IRMA T. GARDNER
DEPUTY PROTHONOTARY

801 City-County Building
Pittsburgh, PA.
15219
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May 8, 1990

Allen N. Brunwasser, Esquire
P.O. Box 22212
Pittsburgh, PA 15222

In Re: Commonwealth of Pennsylvania v. Louis A. La Raia *No. 168 W.D. Allocatur Docket 1989*

Dear Mr. Brunwasser:

The Court has entered the following Order on your Motion for Reconsideration and for Leave to File Application for Post-Conviction Relief in Allegheny County, Pa. in the above-captioned matter.

"Denied
5/4/90
Per Curiam"

The Original Record in the above-captioned matter has been returned to the Court of Common Plea of Allegheny County, Civil Division today, May 8, 1990.

Very truly yours,
Irma T. Gardner
Deputy Prothonotary

ITG/dad
cc: Ahmed T. Aziz, Esq.
Honorable Roy E. Kunselman
Superior Court of Pennsylvania
(No. 1480 Pittsburgh 1987)